State of Michigan
Supreme Court
Appeal from the Michigan Court of Appeals
[Kelly (M.J.), PJ., Cavanagh and Servitto, JJ.]

Kimberly Marie Marik, Plaintiff-Appellee, v Peter Brian Marik, Defendant-Appellant.	Supreme Court No. 154549 Court of Appeals No. 333687 Trial Court No. 2011-0651-DM Macomb Circuit Court – Fam. Div. Hon. Kathryn A. George

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Defendant-Appellant's Supplemental Brief in Support of Application for Leave to Appeal Before MOAA

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Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Rules

Other Authorities

Re-Statement of Question Presented (per MSC MOAA Order)

Whether the Macomb Circuit Court's June 13, 2016 order denying the defendant father's motion to change the children's school enrollment and to modify parenting time was "a postjudgment order affecting the custody of a minor" and therefore a "final order" under MCR 7.202(6)(a)(iii)?

Plaintiff-appellee answers "no."
Defendant-appellant answers "yes."
The trial court did not address this question.
The Court of Appeals answered "no."

Supplemental Statement of Facts

The factual background of this case was addressed in defendant's application and reply to answer.

Supplemental Argument

Introduction: The focus by plaintiff and the Court of Appeals in *Ozimek v Rodgers*, ___ Mich App ___; ___ NW2d ___ (COA No. 331726, 08/25/16) on "physical custody" as the only form of custody is misplaced. The panel in *Ozimek* correctly asserted this Court's 1994 amendment intended to limit claims of appeal to postjudgment orders affecting custody. Where *Ozimek* and plaintiff go astray is their unsupported conclusion this Court's definition of custody under MCR 7.202(6)(a)(iii) means only physical custody is included in the type of custody orders appealable by right. Nothing in MCR 7.202(6)(a)(iii) or the Child Custody Act, MCL 722.21 *et seq*, supports so narrow a view of the term custody.

No Actionable School Change Dispute Without Legal Custody: A school change dispute such as exists here is an issue for court determination only where parents share legal custody. If a parent has sole legal custody, that parent decides all ***important*** issues concerning the child.[1] The other parent, if aggrieved by a decision of the sole legal custodian, has no remedy in court - other than to seek a share of legal custody if he or she

[1] There is a consensus in the case law that important issues are those involving education, health care treatment, and religious upbringing. Pierron v Pierron, 282 Mich App 222; 765 NW2d 345 (2009), *aff'd on other grounds*, 486 Mich 81; 782 NW2d 480 (2010); *Wellman v Wellman*, 203 Mich App 277; 512 NW2d 68 (1994); *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993); *Nielsen v Nielsen*, 163 Mich App 430; 415 NW2d 6 (1987); *Arndt v Kasem*, 156 Mich App 706; 402 NW2d 77 (1986); and *Fisher v Fisher*, 118 Mich App 227; 324 NW2d 582 (1982).

can satisfy the requisite threshold[2] and burden of proof.[3] A parent without legal custody, but whom exercises parenting time, may decide only ***routine*** matters when the child is in his/her care. MCL 722.27a(11). Custody (the joint legal variant) is the essential precondition for a dispute such this to even reach the court for determination.

No Hierarchy of Custody Types: There is no basis for the position advocated by the panel in *Ozimek* and plaintiff in this case that there is a hierarchy of types of custody that renders physical custody decisions more important than those involving legal custody, or that one is more deserving of final order status than the other. The joint custody section of the Child Custody Act, MCL 722.26a, in subsection (7), defines joint custody as including one or both of the following arrangements:

> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

MCL 722.26a(7).

Under this statutory scheme, shared decision-making ("legal custody") on

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[2] In *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), it was held that the existence of proper cause or a change of circumstances is a threshold matter in any consideration of a change to a prior custody order. The movant has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists before the trial court can proceed with a custody hearing. Nothing in *Vodvarka* limited application of this threshold only to physical custody changes.

[3] If the *Vodvarka* custody modification threshold is satisfied and a hearing is authorized, the court's next obligation is to determine if there is an established custodial environment and, if so, whether the proposed change would disrupt that environment. MCL 722.27(1)(c). *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000); *Ireland v Smith*, 214 Mich App 235; 542 NW2d 344 (1995), *aff'd*, 451 Mich 457; 547 NW2d 686 (1996); *Blaskowski v Blaskowski*, 115 Mich App 1; 320 NW2d 268 (1982).

important decisions affecting the child is "custody." It is no less "custody" than alternating periods of residence ("physical custody"). The panel in *Ozimek* cited no authority for its claim this Court intended the term "custody" in MCR 7.202(6)(a)(iii) to mean only disputes under MCL 722.26a(7)(a) (aka "physical custody), but not disputes under MCL 722.26a(7)(b) (aka "legal custody"). Under the statute, these are co-equal forms of child custody. As explained below, in several ways, legal custody (shared decision making) is more crucial to the exercise of constitutionally protected parental rights than exercises physical custody (alternating periods of residence).

Appeals by Right Historically Allowed from Legal Custody Disputes Including Those Involving School Enrollment: The joint custody statute (MCL 722.26a), the only section in the Act that attempts to distinguish between physical custody (alternative periods of residence) and legal custody (shared decision making on important matters) took effect January 14, 1981. For more than a decade before the 1994 amendment to MCR 7.202 restricting appeals by right in post-judgment domestic relations cases, appeals from physical custody and legal custody decisions were treated identically. After the 1994 amendment to the final order rule, identical treatment of legal custody and physical custody appeals continued, suggesting that the Court of Appeals viewed the term "custody" in the rule to mean legal or physical custody. Appeals by right were recognized from orders affecting legal custody, including orders granting or denying motions to resolve disputes between joint legal custodians over where the children attend school.

Well-known and oft-cited examples of cases where the Court of Appeals permitted appeals by right from orders deciding school enrollment disputes between joint legal

custodians include *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993) [the seminal case addressing school enrollment disputes between parents with joint legal custody was heard as an appeal by right]; *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009) [appeal of right from a post-judgment order granting a motion to enroll child in public school in a dispute between joint legal custodians]; *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010) [an appeal of right from a post-judgment order maintaining children in their current district with joint legal custodians who cannot agree].

Where appeals by right were allowed to proceed, most of which are unpublished, it was implicitly recognized by the Court of Appeals that an order granting or denying a parent's motion related to school enrollment inherently affects that parent's custody rights. It is not legally significant that the category of custody affected is shared decision-making under MCL 722.26a(7)(b) instead of alternating periods of residence under MCL 722.26a(7)(a). No provision in any relevant statute or court rule draws a distinction or creates a hierarchy between the two types of custody. Neither plaintiff nor the panel in *Ozimek* could cite any authority for their view that only physical custody is "real custody" while legal custody is relegated to a second-class status not worthy of resulting in a final order appealable by right.

Legal Custody is "Real" Custody: The view espoused by plaintiff and the *Ozimek* panel that legal custody isn't "real custody" is contrary to the way the law has developed in the decades since adoption of the Child Custody Act and since this Court amended MCR 7.202(6)(a)(iii) in 1994.

In the years following this Court's amendment of the final order rule to exclude non-custody postjudgment orders from the definition of final orders appealable by right, the view of what types of order "affect custody" was gradually expanded through decisions of this Court or of the Court of Appeals. Several types of orders, including those not directly "changing" custody were held to "affect" custody to trigger an appeal by right under the final order rule.

After the 1994 amendment, it was common for the Court of Appeals to administratively dismiss for lack of jurisdiction appeals from change of domicile orders. However, as had become apparent over the years, such orders nearly always affect custody. Even if a change of domicile does not change the child's established custodial environment (a concept distinct from a custody order[4]) under MCL 722.27(1)(c), it "affects" custody.

The first of these was *Thurston v Escamilla*. A claim of appeal was filed from a trial court order changing domicile of a minor child. The Court of Appeals, in COA No. 250568, administratively dismissed the appeal:

> …because the August 12, 2003 order is a post judgment order that does not affect the custody of a minor MCR 7.202(7)(a)(i), 7.203(A)(1), and 7.202(7)(a)(iii). Domicile is not custody. As a result, appellant may challenge the order in question by filing a delayed application for leave to appeal under MCR 7.205. See MCR 7.203 (B)(1).

Thurston v. Escamilla, COA No. 250568, Order dated September 10, 2003.

On application to this Court, in an order dated February 27, 2004, this Court

[4] A custody order, by itself, does not establish a custodial environment. *Bowers v Bowers*, 198 Mich App 320; 497 NW2d 602 (1993). Whether an established custodial environment exists is purely a question of fact to be resolved irrespective of the existence of a custody order, the lack of a custody order, or the violation of a custody order. *Blaskowski v Blaskowski*, 115 Mich App 1; 320 NW2d 268 (1982).

reinstated the appeal and remanded to the Court of Appeals for plenary consideration, stating:

> On order of the Court, the application for leave to appeal the September 10, 2003 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE the September 10, 2003 order of the Court of Appeals and we REMAND this case to the Court of Appeals for plenary consideration. The divorce judgment awarded joint legal and physical custody to both parties, and there was, in fact, an established joint custodial environment under which defendant had nearly daily contact with the children. The August 12, 2003 order of the Saginaw Circuit Court granting plaintiff's motion for change of domicile does not mention a change of custody, but by permitting the children to be removed by plaintiff to the State of New York, the order is one "*affecting* the custody of a minor…" within the meaning of MCR 7.202(7)(a)(iii) [emphasis supplied]. See also MCL 722.31. Therefore, the August 12, 2003 order is final, and appealable by right. MCR 7.203(A)(1).
>
> We do not retain jurisdiction.

Thurston v. Escamilla, 469 Mich 1009; 677 NW2d 28 (2004).

With this order, the Court established the rule that a postjudgment order does not need to "change" custody for it to "affect" custody and therefore be appealable by right. In *Thurston v Escamilla*, this Court recognized the parties shared joint legal and joint physical custody of the child. There was no indication which form of custody this Court thought was "affected" by the change of domicile order. Nor was there a statement that physical custody is the only form of custody that mattered for purposes of "affecting custody." When domicile is changed, both aspects of custody are "affected." Where the child physically resides is affected. But so are decisions affecting major matters affecting the child, such as where the child goes to school, which health care providers the child sees, and which church the child attends.

Next was whether an order denying a request for change of physical custody of a

child "affected custody" so as to be appealable by right. The Court of Appeals addressed this question in *Wardell v Hincka*, 297 Mich App 127, 822 NW2d 278 (2012). In that case, it was recognized that orders ***denying*** as well as ***granting*** a change of custody are orders "affecting custody of a minor." Because they ***affect*** custody even if they don't ***change*** custody, they are appealable by right.

The *Wardell v Hincka* panel stated:

> MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied.

Wardell v Hincka, *supra*, 297 Mich App at 132-133.

A decade after *Thurston v Escamilla* that the Court of Appeals also closed the circle on whether orders ***denying*** rather than ***granting*** a change of domicile similarly "affect custody" and are therefore final orders appealable by right. In *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013), it was acknowledged that since *Wardell v Hincka*, *supra*, it was recognized that orders ***denying*** as well as ***granting*** a change of custody are orders "affecting custody of a minor." Because they ***affect*** custody even if they don't ***change*** custody, they are appealable by right.

Therefore, consistent with its prior decision in *Wardell*, the *Rains* court held that orders denying a change of domicile, even if when they leave the status quo fully in place and don't alter custody, parenting time, or place of residence, are still orders "affecting custody" under MCR 7.202(6)(a)(iii). As stated by the Court of Appeals in *Rains*, "a trial

court need not ***change*** a custodial arrangement in order for its decision to ***affect*** custody." *Rains*, *supra*, 301 Mich App at 323. [Emphasis added.]

Orders granting or denying grandparenting time (formerly grandparent visitation) also presented the issue of whether they "affect custody" and are therefore final orders appealable by right. For more than a decade after the 1994 amendment to the final order rule, the Court of Appeals sometimes administratively dismissed for lack of jurisdiction appeals by right from grandparenting time orders.

Examples of this treatment were the initial dismissal of claims of appeal filed from two grandparenting time orders is *Varran v Granneman*. In two separate but related appeals, COA Nos. 321866 and 322437, the Court of Appeals entered orders of administrative dismissal, stating in 321866:[5]

> The claim of appeal is DISMISSED for lack of jurisdiction because the order dated April 25, 2014 and entered in the circuit court register of actions on May 1, 2014 is not a final order appealable of right. MCR 7.202(6)(a); MCR 7.203(A). That order is not a final order under MCR 7.202(6)(a)(iii) because it is not an order affecting custody within the meaning of that court rule provision. MCR 7.202(6)(a)(iii), which is directed at postjudgment orders in domestic relations actions, must reasonably be considered to use the term "custody" as it is used in Michigan domestic relations law and, thus, cannot reasonably be considered to extend to orders that merely allow parenting or grandparenting time without affecting custody under our domestic relations law. *See, e.g., Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010) (discussing that adjustments to parenting time do not necessarily affect established custodial environment). This is true regardless of whether the May 1, 2014 order might affect custodial rights as discussed in constitutional case law. At this time, appellant may seek to appeal the May 1, 2014 order by filing a delayed application for leave to appeal under MCR 7.205(G).

Particularly striking in both dismissal orders was the statement that MCR

[5] A substantially similar order of administrative dismissal was entered in No. 322437.

7.202(6)(a)(iii) must "must reasonably be considered to use the term 'custody' as it is used in Michigan domestic relations law…." Yet the order contained no discussion of how the term "custody" is used in Michigan domestic relations law - or even whether there was a single definition of the term "custody."

Had the Court of Appeals in *Varran* first reviewed the Child Custody Act, it would have found two authorized uses of the term custody, both of which are found in the joint custody statute, MCL 722.26a(7). The first is based on physical residence and the second is based on decision-making on important matters affecting the welfare of the child. Armed with knowledge of those statutes, it would have been difficult for the Court of Appeals to conclude that grandparenting time is not an important matter affecting a child's welfare implicating MCL 722.26a(7)(b).

This Court was asked to review the administrative dismissals and vacated both orders. The Court of Appeals was on instructed on remand to determine "whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Varran v Granneman*, 497 Mich 928; 856 NW2d 555 (2014); *Varran v Granneman*, 497 Mich 929; 856 NW2d 555 (2014).

On remand, the Court of Appeals cited and quoted from the definition of "custody" in *Black's Law Dictionary* (10th ed) and concluded that custody involves "legal custody (decision-making authority) and physical custody (caregiving authority)" *Varran v Granneman*, 312 Mich App 591, 604; 880 NW2d 242 (2015). Also cited was this Court's decision in *Grange Ins Co of Mich v Lawrence*, 494 Mich 475; 835 NW2d 363 (2013), which

recognized both legal custody and physical custody.

Of critical importance because of its bearing on the instant case, the *Varran* panel stated:

> We recognize that the Michigan cases thus far addressing MCR 7.202(6)(a)(iii) have addressed physical custody and have thus focused their inquiries on the effect of the challenged order on where the child would live. It would thus be tempting to conclude that this Court rule only comes into play when the physical custody of a child is at issue. Although there is a distinction between physical and legal custody, ***MCR 7.202(6)(a)(iii) contains no distinguishing or limiting language.*** Based on the plain language of the terms used in MCR 7.202(6)(a)(iii) then, a "postjudgment order affecting the custody of a minor" is an order that ***produces an effect on or influences in some way the legal custody*** or physical custody of a minor. [Emphasis added.]

Varran, *supra*, 312 Mich App at 604. The *Ozimek* panel, although citing *Varran* briefly for the proposition that rules of statutory construction apply to interpretation of court rules, never directly confronted the above language. It is language which cannot be rationally reconciled with its decision in *Ozimek* that an order also implicating a major decision affecting children is not appealable by right.

After this Court remanded *Ozimek* to the Court of Appeals, the Court of Appeals panel should have recognized that its subsequent decision limiting the term "affecting custody" in the final order rule to "physical custody" conflicted with its prior holding in *Varran*. A conflict resolution panel should have been convened under MCR 7.215(J) because a "panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court."

Ozimek cannot be reconciled with or meaningfully distinguished from *Varran*. If an

order "produces an effect on or influences in some way the legal custody," it is a final order appealable by right. Denying a parent the choice of where to send his/her children to school affects legal custody. The *Ozimek* panel was bound to follow *Varran* or declare a conflict under MCR 7.215(J). It did neither.

Recently, on March 16, 2017, another panel of the Court of Appeals agreed that *Ozimek* was bound by *Varran* and incorrectly limited the term "custody" in the final order rule to "physical custody." *Hoskins v Hoskins*, COA No. 334637, decided March 16, 2017, attached as Supplemental Appendix 3. As stated at FN 2 on pp 3-4 of *Hoskins*:

> We are cognizant that this Court recently made a contrary statement—that the court rule's reference to "custody" should be read to only relate to physical custody. *Ozimek v Rodgers (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 331726); slip op, p 6, lv pending. However, *Ozimek*, like us, was bound by our prior decision in *Varran*. MCR 7.215(J)(1). Consequently, we do not believe we are bound by *Ozimek's* determination.

When a panel of the Court of Appeals, in an unpublished decision, states it is not bound by one of the central holdings in a recent published decision now on appeal to this Court, that suggests substantial chaos and uncertainty exists within the Court of Appeals that can only be result by full consideration in this Court.

Although the *Hoskins* panel unequivocally found that the final order rule applies to decisions affecting legal custody as well as physical custody, it then reached an incorrect decision on jurisdiction over a school change order because of a fatal flaw in its reasoning. The panel's conclusion that that the trial court's resolution of a school enrollment dispute between parents with legal custody has no "affect" on legal custody is premised on the faulty view that choice of schools is within the "decision-making *authority* of any parent."

Hoskins, Slip Opinion, p 5. [Emphasis in original.]

The panel put the emphasis on the wrong word. The key word, and where they made a fatal analysis error, is that not "any" parent has such decision-making authority post-divorce or post entry of a custody order. Only parents conferred by the court with the status of legal custodian have such authority. A parent without legal custody has no decision-making authority. Therefore, a school enrollment dispute can come before the court only where two parents, each with legal custody, disagree. The court decides which parent's legal custody rights prevail, thereby intruding on the legal custody rights of the other parent. This is an "affect" on legal custody that must give rise to an appeal by right.

It does not matter that the parties may have initially agreed on joint legal custody. Parents cannot agree on any custody arrangement, legal or physical, to the exclusion of the court's authority, indeed obligation, to make custody orders in the best interests of the children. Therefore, legal custody, like physical custody, is a status conferred by the court, not merely by agreement of the parties. *Harvey v Harvey*, 470 Mich 186, 193; 680 NW2d 835 (2004); *Phillips v Jordan*, 241 Mich App 17; 614 NW2d 183 (2000).

When the court places the view of one legal custodian over the other in terms of school choices, that determination "affects" the legal custody rights of the parents. The order, therefore, is a final order under the rule.

Legal Custody is a Fundamentally Important Right[6]: It has long been established that parents have a wide range of fundamental rights concerning decision-making on

[6] On this issue, defendant adopts and incorporates by reference the more expansive argument made in the supplement brief filed by appellant in the related case of *Ozimek v Rodgers*, SC No. 154776.

behalf of their children, whether part of a two-parent family, divorced, or single. The United States Supreme Court has held that the care, custody and control of one's children comprise a fundamental natural and constitutional right. Smith v Organization of Foster Families (OFFER), 431 US 816, 845 (1977); *Stanley v Illinois*, 405 US 645, 651 (1972); *Santosky v Kramer*, 455 US 745, 758 (1982).

This Court has similarly recognized the fundamental nature of parental decision-making on behalf of their children. *In re Clausen*, 442 Mich 658; 502 NW2d 649 (1993); *In re LaFlure*, 48 Mich App 377; 385, 210 NW2d 482, *lv den* 380 Mich 814 (1973).

However, these universally acknowledged parental rights mean little after entry of a custody order by a court unless that parent has been granted a share of legal custody. Having legal custody determines whether a parent may assert not only his/her rights to care, custody, and control of his/her children, but also whether the parent may assert right on behalf his/her child.

In *Elk Grove Unified School District v Newdow*, 542 US 1 (2004), a father who shared physical custody with the mother, but who lacked legal custody (in California, as in Michigan, defined as shared decision making on important issues affecting the child's welfare), had no legal standing to challenge the constitutionality of a statute requiring his daughter to recite the pledge of allegiance at school. A parent without legal custody is a parent whose parental rights are substantially degraded. Therefore, an order affecting legal custody implicate fundamental rights and should not be relegated to second-class status. Like an order affecting physical custody, it should be appealable by right.

Michigan law also places considerable importance on having legal custody. MCL

722.31, also part of the Child Custody Act, provides that the rules governing a change of a child's legal residence (aka change of domicile) do not apply if the relocating parent has sole legal custody. As stated in MCL 722.31(2), "This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents."

As a practical matter, it means that a parent without a share of legal custody is effectively powerless to prevent the other parent from removing the child from Michigan and relocating across the country or around the world. Before granting a change of domicile to a parent with sole legal custody, a court need not (and must not) apply the so-called *D'Onofrio* factors codified in MCL 722.31(4). *Spires v Bergman*, 276 Mich App 432; 741 NW2d 523 (2007).

Application of the MCL 722.31(4) factors would otherwise mandate consideration of, among other things, whether "it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent." Lacking a share of legal custody can in a near complete severing of the parent child relationship due to a change of domicile because no consideration of the impact on parenting time is required.

Similarly, for a period of time after this Court's decision in In re AJR, 496 Mich 346; 852 NW2d 760 (2014), having a share of legal custody of one's child fully shielded a parent against termination of his/her parental rights in a stepparent adoption proceedings. This was true even if the parent sharing legal custody had been absent from the child's life and failed to pay support for the two-year period specified in the statute as authorizing

termination of rights. MCL 710.51(6)

The version of the stepparent adoption statute in effect at the time of this Court's decision[7] was interpreted as precluding termination of the rights of a parent in a stepparent adoption proceeding if that parent had joint legal custody. This Court stated that "Michigan has long recognized that the concepts of legal custody and physical custody are distinct and allocable between parents." Citing *Lustig v Lustig*, 99 Mich App 716, 719; 299 NW2d 375 (1980), this Court further explained that legal custody "is concerned with making decisions which significantly affect the life of a child." Both the result and the language used by this Court in *AJR* run counter to the *Ozimek* panel's view that legal custody is not ***real*** custody as that term is used in MCR 7.202(6)(a)(iii).

Inconsistent Application of MCR 7.202(6)(a)(iii): One of the most perplexing problems associated with the view expressed by the panel in *Ozimek* is the continued inconsistency of how the purported rule is applied to real cases. There is no consistency. Few months pass without release of a decision (typically unpublished) where an appeal by right from either a legal custody or parenting time order (or sometimes both) reaches a panel for decision after being filed as an appeal by right. If the rule in *Ozimek* were applied uniformly and consistently, such an appeal would have been administratively dismissed as was the appeal in the instant case. That is not happening.

The most recent example is the Court of Appeals unpublished decision in *Duhl v Ladomer*, COA No. 334307, decided March 14, 2017, attached as Supplemental Appendix

[7] In reaction to this Court's decision in *AJR*, the Legislature amended MCL 710.51(6) in PA 143 of 2016 to change the language of the statute and allow stepparent adoptions in joint legal custody situations so long as the other statutory requirements were satisfied.

1. As stated in the first line of the decision, "Defendant appeals as of right the trial court's order modifying legal custody and parenting time." Under *Ozimek*, neither of these issues would be appealable by right. This was not a case where a parenting time modification resulted in a change of custody. As concluded by the panel, "The record evidence supported the trial court's determination that the parenting time modification did not alter the children's established custodial environment with defendant." Slip Opinion, p 3. The panel also gave full consideration to the legal custody issue, treating it (properly, in our view) as a ***real*** change of custody and analyzing it as such with a full exploration of the best interests factors in MCL 722.23. Slip Opinion, pp 5-8.

Duhl is only the most recent example of the Court of Appeals treating an order affecting legal custody as a final order appealable by right. In appellant's application, also cited were the recent decisions in *Mellema v Mellema*, COA No. 329206, decided April 21, 2016 [change in school district affected joint legal custodial decision-making], Appendix O to application; and *London v London*, COA No. 325710, decided October 13, 2015, Appendix P to application.

At the same time, we continue to see administrative dismissal orders not only in appeals "affecting" legal custody such as the school change issue in the instant case, but also from orders actually "changing" legal custody. Citing *Ozimek*, The Court of Appeals administratively dismissed and appeal by right from a change of legal custody in *Voss v Voss*, COA No. 335007, order dated October 5, 2016, attached as Supplemental Appendix 2.

The inconsistency in application of the rule espoused in *Ozimek* suggests that it is

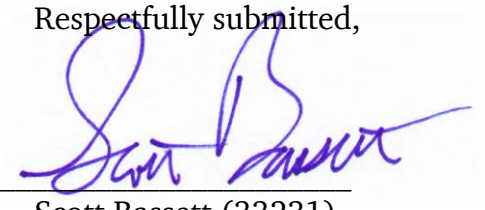
not a workable rule. Attorneys representing clients in post-judgment domestic relations appeals are unable with any confidence to properly advise clients whether orders in their cases are appealable by right or by leave. A more workable interpretation of the existing rule would be to treat any order "affecting" (granting or denying a modification of) a component of legal custody (education, medical care, or religious upbringing) as a final order appealable by right. Obviously, orders actually changing or denying a change of legal custody would also be final orders appealable by right.

Conclusion/Relief Requested

The position advanced by plaintiff and by the panel in *Ozimek* ignores that custody can be legal or physical and improperly creates a hierarchy that defines physical custody as the only true custody. There is no statutory or case law support for such a hierarchy. Shared decision making on important issues affecting the welfare of the child can be as important, and often more important, than alternating periods of residence.

Defendant requests this Court grant leave to appeal or, in the alternative, vacate the Court of Appeals' dismissal of his appeal and remand to the Court of Appeals for full consideration of his appeal as an appeal by right. In addition, this Court should amend MCR 7.202(6)(a)(iii) to clarify that post-judgment orders affecting either legal or physical custody be considered final orders appealable by right.

Respectfully submitted,



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STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE L. DUHL, formerly known as STEPHANIE L. LADOMER, Plaintiff-Appellee,	UNPUBLISHED March 14, 2017
v	No. 334307 Wayne Circuit Court Family Division
WILLIAM P. LADOMER, Defendant-Appellant.	LC No. 12-102882-DM

Before: RIORDAN, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order modifying legal custody and parenting time. We affirm.

Plaintiff and defendant were married on April 2, 2003, and share one daughter, BL, born on January 3, 2005, and one son, GL, born on October 17, 2006. The parties divorced on February 8, 2013. The judgment of divorce awarded the parties joint legal and physical custody, with shared parenting time. Defendant would exercise parenting time one week from Monday after school and overnight through Thursday morning, and the next week from Sunday at 5:00 p.m. and overnight through Thursday morning. The weeks alternated accordingly. Plaintiff exercised parenting time the rest of the week.

On March 13, 2015, plaintiff filed a motion to enforce the judgment of divorce and modify parenting time. She requested that the trial court award defendant parenting time every other weekend during the school year, and every other week during the summer. In support of her motion, plaintiff alleged, among other things, that issues existed with regard to the school attendance of the children, GL's academic performance, and defendant supporting the children with their extra-curricular activities. On July 21, 2015, the trial court entered an order that plaintiff's motion requesting a modification of parenting time be scheduled for an evidentiary hearing, finding: (1) an established custodial environment existed with both parties; (2) plaintiff's requested modification would not change either established custodial environment; (3) plaintiff's motion amounted to a motion to modify parenting time, not custody; and (4) plaintiff met the threshold required by *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010) to consider a modification of parenting time. Following the six-day evidentiary hearing that

spanned a time period from October 2015 to May 2016, the trial court granted plaintiff sole legal custody of the children, and modified parenting time. Under the new schedule, defendant would exercise parenting time every other weekend during the school year, from Thursdays after school and overnight to Monday morning, and every other week during the summer. For a summer schedule, the trial court's order provides that the parties alternate parenting time on a weekly basis beginning the second week that school recesses, until the week before school resumes. Plaintiff is to have parenting time the week after school ends and the week before school resumes.

Defendant first argues on appeal that the trial court erred in its determination that its parenting time modification would not alter the children's established custodial environment, and when it modified parenting time without clear and convincing evidence that such a modification would be in the children's best interests. We disagree.

" 'Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue.' " *Shade*, 291 Mich App at 20-21, quoting *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). The same is true for custody orders. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28. The existence of an established custodial environment "is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Berger*, 277 Mich App at 706, citing MCL 722.28 and *Mogle v Scriver*, 241 Mich App 192, 196-197; 614 NW2d 696 (2000).

Findings are against the great weight of the evidence if the "facts clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21 (citation omitted). This Court must defer to the trial court's credibility determinations. *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009). "In child custody cases, '[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.' " *Shade*, 291 Mich App at 21, quoting *Berger*, 277 Mich App at 705 (alteration in original). Finally, "[t]he clear legal error standard applies when the trial court errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

"An established custodial environment exists 'if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.' " *Pierron v Pierron* (*Pierron I*), 282 Mich App 222, 244; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010), quoting MCL 722.27(1)(c). In other words, it is " 'a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Pierron I*, 282 Mich App at 244 (alteration in original), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Children may have established custodial environments with both parents at the same time. *Pierron I*, 282 Mich App at 244.

" 'When a modification in parenting time would amount to a change of the established custodial environment, it should not be granted unless the circuit court is persuaded by *clear and convincing evidence* that the change would be in the best interest of the child.' " *Rains v Rains*, 301 Mich App 313, 340; 836 NW2d 709 (2013) (emphasis added), quoting *Pierron I*, 282 Mich App at 249. On the other hand, "[i]f the proposed change does not change the custodial environment, . . . the burden is on the parent proposing the change to establish, *by a preponderance of the evidence*, that the change is in the child's best interests." *Shade*, 291 Mich App at 23 (emphasis added), citing *Pierron v Pierron (Pierron II)*, 486 Mich 81, 93; 782 NW2d 480 (2010). The same is true for modifications of custody. MCL 722.27(1)(c); *Shade*, 291 Mich App at 23; *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000). If a parenting time modification " 'will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed.' " *Rains*, 301 Mich App at 340, quoting *Pierron II*, 486 Mich at 86.

The record evidence supported the trial court's determination that the parenting time modification did not alter the children's established custodial environment with defendant. In the initial schedule the parties followed after the entry of the judgment of divorce and until the modification of parenting time, defendant had seven overnights with the children every 14 days, effectively exercising equal parenting time with plaintiff. The overnights occurred mostly during the children's school week. Under the modified schedule, defendant has four overnights with the children every 14 days, some during the school week and some on the weekends. However, a reduction in overnights does not necessarily lead to a change in the established custodial environment. See *Rains*, 301 Mich App at 341. Although it is true that the new schedule reduces defendant's parenting time and he will now have to exercise parenting time on days that he is working, he still has the opportunity to spend time with the children in the afternoons and evenings. The same was true under the previous schedule, where the children attended school on the days defendant exercised parenting time. The new schedule also does not preclude defendant from participating in the children's schooling. He can still attend Parent Teacher Association (PTA) meetings and classroom events, and still assist the children with their homework on Thursdays evenings and throughout his parenting time weekends. The children will therefore have ample opportunity to seek defendant's guidance, discipline and parental comfort. The trial court's finding that the modified parenting time schedule would not alter the children's established custodial environment with defendant was not against the great weight of the evidence. Accordingly, the trial court properly applied the preponderance of the evidence standard to its best-interest determination.

Defendant next argues that the trial court erred by significantly altering the amount of days he would be able to spend with the children without first determining if proper cause or a change of circumstances warranted such a modification in compliance with *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). We disagree.

"This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009), citing *Vodvarka*, 259 Mich App at 507-508. Findings are against the great weight of the evidence if the "facts clearly preponderate in the opposite direction." *Shade*, 291 Mich App at 21, citing *Rittershaus v Rittershaus*, 273 Mich App 462, 473; 730 NW2d 262 (2007).

"MCL 722.27(1)(c) provides that if a child custody dispute has arisen from another action in the circuit court, the court may '[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . .' " *Vodvarka*, 259 Mich App at 508 (alteration in original). The moving party must prove, by a preponderance of the evidence, the existence of proper cause or a change of circumstances before the trial court may conduct a hearing to review the best-interest factors. *Id.* at 509. However, the trial court is not required to conduct a hearing on the topic. *Corporan*, 282 Mich App at 605.

For proper cause, "a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Vodvarka*, 259 Mich App at 512. Generally, in making its determination, the trial court should "limit its consideration to events occurring after entry of the most recent custody order but . . . there will be unusual cases where that rule is not applicable." *Id*. at 501. To demonstrate a change of circumstances, "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513. Further, "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514.

To make its determination regarding proper cause or change of circumstances in the context of a request to modify parenting time, a trial court should first look to the children's established custodial environment. "If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Shade*, 291 Mich App at 27 (citations omitted). In contrast, "a more expansive definition of 'proper cause' or 'change of circumstances' is appropriate for determinations regarding parenting time when a modification in parenting time does not alter the established custodial environment." *Id*. at 28. Under this more expansive definition, "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Id*. at 30.

Our review of the record confirms that the trial court properly determined that plaintiff met the threshold to revisit parenting time set forth in *Shade*. Under the parties' previous parenting time schedule, the children split time during the school week between the parties' homes. However, as the evidence demonstrates, over time, the children began to experience normal life changes that no longer made such a schedule appropriate. For example, the children began participating in extracurricular activities that require time and dedication. The record evidence demonstrated that defendant does not encourage these activities to the same degree as plaintiff. Specifically, plaintiff testified that she had to exclusively schedule dance and gymnastics classes for the children during her parenting time because defendant was uncooperative and unwilling to take the children during his parenting time. Defendant himself conceded during his testimony that he only took BL to dance class four or five times in three years. As a result, the children were not progressing to their full capabilities in extra-curricular activities given their restrictions on participation as a result of defendant's lack of cooperation.

See *Shade*, 291 Mich App at 30-31 ("[I]n a case where a modification of parenting time does not alter the established custodial environment, the fact that a child has begun high school and seeks to become more involved in social and extracurricular activities . . . constitutes a change of circumstances sufficient to modify parenting time.").

The children also began to get older and advance in grade level, requiring a stronger focus on school and homework. The record demonstrated that lack of consistency between the parties' homes made such a focus difficult, especially for GL. Plaintiff testified that GL often came to her for parenting time with his homework incomplete, and that his grades had suffered partly as a result of defendant's lack of participation in his academics. For example, defendant seemed reluctant to acknowledge that GL bore any fault for cheating on a math test. In addition, plaintiff testified that she employed the homework rewards system suggested by GL's fourth grade teacher, but to her knowledge, defendant did not. An evaluation conducted at the New Oakland Adolescent and Family Center recommended more structure and stability for GL. With regard to BL, plaintiff acknowledged that she consistently did well in school, but believed she could be doing better. From this evidence, proper cause or change of circumstances as set forth in *Shade*, 291 Mich App at 30-31, existed to revisit the parties' parenting time schedule. Thus, the trial court correctly determined that plaintiff met the necessary threshold.[1]

Defendant next argues that the trial court abused its discretion by allowing plaintiff to request modification of legal custody on the last day of the evidentiary hearing. We disagree.

"This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger*, 277 Mich App at 705, citing MCL 722.28. "An abuse of discretion with regard to a custody issue occurs 'when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.' " *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012), quoting *Berger*, 277 Mich App at 705.

The trial court did not abuse its discretion by awarding plaintiff sole legal custody without plaintiff requesting such relief in her motion. A court's decision regarding custody should reflect the best interests of the children involved. *Berger*, 277 Mich App at 705. Despite defendant's argument to the contrary, the record contained evidence regarding the parties' inability to communicate and effectively co-parent, and demonstrated that granting plaintiff sole legal custody would be in the children's best interests. Defendant conceded that he and plaintiff

[1] As concluded above, the trial court properly determined that the parenting time modification would not alter the children's established custodial environment with defendant. Further, although the trial court only conducted a threshold analysis to determine whether proper cause or change of circumstances existed to revisit parenting time with regard to the modification originally requested by plaintiff, the final schedule the trial court ordered in fact provided defendant more time than that originally requested by plaintiff. Thus, a second analysis regarding proper cause and change of circumstances, as defendant suggests on appeal was necessary, would not have altered the trial court's determination.

could not effectively co-parent, and that plaintiff was not responsive to his e-mails and text messages. Further, the trial court expressed its concerns regarding legal custody well before the final day of the evidentiary hearing. For example, at the first day of the evidentiary hearing on October 5, 2015, the trial court made very clear its reservations about the parties' ability to co-parent on the basis of their acrimonious communication. Additionally, plaintiff's counsel stated that the motion was based on the entirety of the evidence adduced throughout the evidentiary hearing regarding the parties' inability to effectively co-parent for the best interests of the children. Moreover, MCR 2.119(A)(1) provides that a motion may be made during a hearing such as the evidentiary hearing that took place in this case. [2]

Finally, defendant argues that, in its best interest determination, the trial court should have specified which best-interest factors pertained to legal custody. Further, he argues that the trial court's findings with regard to best interest factors (a), (b), (d), (e), (h), and (k) are against the great weight of the evidence, and that the trial court improperly considered defendant's anger in its review of the factors. We disagree.

"The child's best interests govern a court's decision regarding parenting time." *Shade*, 291 Mich App at 31, citing MCL 722.27a(1) and *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). Further, "parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The best-interest factors in MCL 722.23, as well as the parenting time factors listed in MCL 722.27a(7), are relevant to a trial court's parenting time determination. *Shade*, 291 Mich App at 31. "While a trial court must make findings under all of the MCL 722.23 factors for a custody decision, 'parenting time decisions may be made with findings on only the contested issues.' " *Demski v Petlick*, 309 Mich App 404, 457; 873 NW2d 596 (2015), quoting *Shade*, 291 Mich App at 31-32. A court's findings of fact related to each of the best-interest factors are subject to the great weight of the evidence standard. *McIntosh*, 282 Mich App at 475.

Our review of the record confirms that the trial court considered each of the best-interest factors, and it is clear from its findings that it did so with regard to both parenting time and legal custody. Thus, the record is sufficient for this Court to make a determination regarding whether the evidence presented clearly preponderates against the findings. See *Rittershaus*, 273 Mich App at 475. Further, although defendant challenges the trial court's consideration of what the trial court characterized as defendant's angry, uncooperative and petulant demeanor and "reprehensible" way of interacting with plaintiff, such matters are properly weighed in an

[2] At the close of the six-day evidentiary hearing, the trial court also determined that granting plaintiff sole legal custody would not alter the children's established custodial environment with defendant. To the extent that defendant challenges this determination, we conclude that the record supports the trial court's decision where defendant's ability to spend significant time with the children, participate in their education and provide guidance, support, discipline and parental comfort will not be diminished.

evaluation of defendant's credibility, and we will defer to the trial court's determinations in that regard. *McIntosh*, 282 Mich App at 474.

In making its custody and parenting time determinations, the trial court analyzed each of the best-interest factors, and weighed factors (b), (d), (h), (j), and (k) in plaintiff's favor; and factors (a), (c), (f), (g), and (j) in favor of both parties. For factor (e), the trial court made extensive findings, and appeared to weigh factor (e) equally in favor of both parties. With regard to factor (i), the trial court noted that it conducted *in camera* interviews to determine the children's preferences. Finally, for factor (l), the trial court said that it considered plaintiff's delays in responding to defendant as part of their communication, as well as the fact that defendant may benefit from counseling.

Factor (a) involves "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). Despite defendant's argument to the contrary, our review of the record confirms that the trial court did indeed render findings with regard to factor (a). Defendant asserts that the trial court did not adequately account for the bond between him and the children. However, the record supports the trial court's findings regarding factor (a). Plaintiff testified that she and BL have a strong relationship and that BL confides in her. She said that she has the same type of relationship with GL. Defendant also testified regarding his bond with the children, stating that the children look to him for guidance, care, and understanding. The trial court duly considered this evidence before rendering its factual findings. The trial court's findings for factor (a) were not against the great weight of the evidence.

Under factor (b), a trial court must consider "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court found that both parties had the capacity and disposition to provide the children love, affection, and guidance, but weighed the factor in plaintiff's favor, noting that defendant struggles with setting aside his personal feelings and putting the children first. On appeal, defendant argues that the trial court allowed its personal feelings about him to cloud the trial court's judgment. Defendant also strenuously argues that both children are doing well in school. According to defendant, the parties' animosity does not affect the children.

The trial court's findings with regard to factor (b) were not against the great weight of the evidence. The record contains substantial evidence that defendant's animosity toward plaintiff impacted the children as well as plaintiff and defendant's ability to communicate effectively regarding the children. Plaintiff testified that defendant was uncooperative and difficult regarding taking the children to extracurricular activities during his parenting time. Defendant referred to plaintiff as "princess" in text messages, and often replied to plaintiff's attempts to communicate regarding the children's needs in an uncooperative manner. According to plaintiff, she often delayed communication with defendant about the children because she wanted to avoid (1) getting yelled at by him or (2) what she characterized as an inevitable argument. While we acknowledge that the record evidence at the close of the evidentiary hearing reflected that BL was doing well in school, and that GL in particular had shown improvement, the trial court's findings for factor (b) were not against the great weight of the evidence.

Under factor (d), a trial court must consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court weighed this factor in plaintiff's favor, finding that having a home base would benefit the children, and observing that the parties' current parenting time arrangement was not serving the children's best interests. Defendant argues that the court's determination was inconsistent with its finding that the children had an established custodial environment with him.

The record supports the trial court's findings with regard to factor (d). The evidence demonstrates that plaintiff provides the type of stable environment the children need during the school week. She testified that she helped both children, especially GL, with their homework, and kept well-apprised of the children's school assignments. She also participated in a homework rewards program recommended by GL's teacher to encourage GL to excel at school. Further, plaintiff actively supported the children's involvement in extracurricular activities. In contrast, the record reflected that defendant often sent GL to parenting time with plaintiff with incomplete homework. He also did not acknowledge the serious issue of GL cheating in his math class and, to plaintiff's knowledge, was not actively participating in the homework rewards program suggested by GL's teacher to help GL improve in school. While defendant testified that he did actively support the children with their homework and understood the importance of their schoolwork, the trial court's findings with regard to factor (d) were not against the great weight of the evidence.

With regard to factor (e), a trial court must consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). The trial court expressed its concern that Desmond Johansen, plaintiff's fiancé, and plaintiff had not yet married, and that she could be dispossessed of the home they shared. Defendant argues that the record demonstrates that his home is more stable and permanent than plaintiff's. The trial court's conclusion that plaintiff offered the children a stable, acceptable home was not against the great weight of the evidence. We acknowledge that Johansen conceded that he once asked plaintiff to leave their Garden City home during a disagreement, and both he and plaintiff admitted that he owned the home solely in his name. However, Johansen also said that he considered his home to be a permanent residence for plaintiff and the children, and the children were able to decorate their own rooms and had dedicated spaces to do their homework and for play. Therefore, the record evidence supported the trial court's conclusion on factor (e).

For factor (h), a trial court must consider "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court weighed factor (h) in plaintiff's favor, finding her best equipped to take primary responsibility for the children's success in school. Defendant argues that the evidence, particularly toward the latter part of the evidentiary hearing, demonstrated that the children were doing well in school, and had an excellent home, school, and community record under the parenting time schedule existing before the trial court's modification. However, the record supports the trial court's findings for factor (h). The record confirms that plaintiff actively encouraged the children's participation in extracurricular activities, and provided structure and discipline, especially with regard to the children's homework and academic responsibilities. On the other hand, the record demonstrated that defendant was not an active participant in the children's extracurricular activities, sent GL to plaintiff's home with incomplete homework assignments, and refused to fully acknowledge some

of GL's difficulties with school. The trial court's findings with regard to factor (h) were not against the great weight of the evidence.

With regard to factor (k), a trial court must look to "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(k). The trial court weighed factor (k) in plaintiff's favor, based on plaintiff's testimony. Defendant argues that he was never arrested for, or convicted of, domestic violence, and that GL had actually been the victim of domestic violence when he had his mouth taped shut during plaintiff's parenting time. The record supports the trial court's findings and conclusion with regard to factor (k). Plaintiff testified that defendant previously put his hands on her without her consent three or four times. There was also testimony that defendant had pulled a gun on plaintiff when BL was an infant. On the other hand, defendant confirmed that Child Protective Services (CPS) did not substantiate GL's claims that his mouth was taped shut during plaintiff's parenting time. Thus, the trial court's findings under factor (k) were not against the great weight of the evidence.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

Court of Appeals, State of Michigan

ORDER

Marie V Voss v Nicholas L Voss

Docket No. **335007**

LC No. **13-024323-DM**

Michael J. Talbot, Chief Judge, acting under MCR 7.203(F)(1), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because the September 8, 2016 order appealed from is not appealable of right as claimed by appellant. MCR 7.203(A). An order that only affects legal custody of a child, without affecting physical custody, is not an order affecting "custody" within the meaning of that term as used in MCR 7.202(6)(a)(iii). *Ozimek v Rodgers*, ___ Mich App ___; ___ NW2d ____ (Docket No. 331726, issued August 25, 2016), pp 5-7. Appellant may seek to appeal the September 8, 2016 order by filing a delayed application for leave to appeal under MCR 7.205(G).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

OCT 05 2016

Date

Chief Clerk

Supplemental Appendix 2

STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY L. HOSKINS,

Plaintiff-Appellee,

v

RONETTA N. HOSKINS,

Defendant-Appellant.

UNPUBLISHED
March 16, 2017

No. 334637
Oakland Circuit Court
Family Division
LC No. 2010-776355-DM

Before: HOEKSTRA, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

In this domestic relations action, defendant appeals as of right the trial court's order that (1) granted plaintiff's motion to increase his parenting time, (2) changed the school that their two minor children attended, and (3) referred his motion to reduce child support to the friend of the court. Previously, plaintiff moved this Court to dismiss defendant's appeal for lack of jurisdiction, which we denied without prejudice in order to more fully address this issue here.[1] We hold that we have jurisdiction over the portion of the order that altered parenting time, but we do not have jurisdiction over the other portions of the trial court's order. Accordingly, we dismiss the issues not related to parenting time. And for the reasons provide below, we reverse the portion of the order that granted the increase in plaintiff's parenting time.

Plaintiff and defendant were married in 2007 and had two children during the course of their marriage. The judgment of divorce provided that defendant would have sole physical custody of the children, the parties would share legal custody, plaintiff would be entitled to 48 overnight visits of parenting time and would be responsible for $4,584 per month in child support. Plaintiff appealed that decision by the trial court, but this Court affirmed on all issues. *Hoskins v Hoskins*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2013 (Docket No. 309237).

[1] *Hoskins v Hoskins*, unpublished order of the Court of Appeals, entered January 11, 2017 (Docket No. 334637).

After two failed attempts by defendant to obtain an order to allow her and the children to move to Texas, plaintiff moved for additional parenting time in December 2015. Defendant opposed the motion and argued that it would not be in the best interests of the children to increase plaintiff's parenting time when he had previously failed to exercise his allotted 48 overnight visits. Plaintiff asserted that consistent with his testimony from a July 2015 hearing, he had taken a new position with his employer since the judgment of divorce was entered, which required less travel and allowed him to exercise more parenting time. The trial court granted plaintiff's motion and allowed for plaintiff to have shared holidays, time over the summer, and alternating weekends with the children. The order increased plaintiff's overnight visits from 48 to approximately 80.

Approximately seven months later, in July 2016, plaintiff again moved for a further increase of parenting time. Plaintiff also moved to order the minor children to be enrolled in public school rather than private school (where defendant had enrolled them) and to reconsider the issue of child support in light of plaintiff's additional parenting time, his reduced income, and an increased imputation of income to defendant. Defendant urged the trial court to deny the motion and argued that plaintiff suffered from alcohol abuse, had previously been arrested for drunk driving, and had a history of missing his parenting-time sessions. Those combined issues, defendant argued, showed that an increase in plaintiff's parenting time would not be in the best interests of the children. Furthermore, defendant also asserted that plaintiff failed to establish a change in circumstances to warrant a change in parenting time, as she claimed to have a sworn statement from plaintiff's employer that showed that there was not any change in plaintiff's employment position. Defendant also argued that plaintiff's motion to change schools was untimely and without merit, as plaintiff had previously approved of the school in which the children were enrolled. The trial court heard oral argument on the issue and, in an order entered on August 17, 2016, granted plaintiff's motion to increase his parenting time (amounting to 125 overnights per year). The trial court also ordered that the children be immediately enrolled in public school pending an evidentiary hearing to be held in January 2017 and that the issue of child support was to be referred to the friend of the court for recalculation.

I. JURISDICTION

Plaintiff argues that this Court does not have jurisdiction to hear the appeal because the order appealed was not appealable of right pursuant to the court rules. "Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo." *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012). Similarly, the interpretation of a court rule is a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). This Court recently discussed the proper method for the interpretation of a court rule in *Varran v Granneman (On Remand)*, 312 Mich App 591, 599; 880 NW2d 242 (2015) (citations omitted):

> The rules of statutory interpretation apply to the interpretation of court rules. The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning.

Under MCR 7.203(A)(1), this Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court[.]" MCR 7.202(6)(a) defines "final judgment" or "final order" in a civil case to include:

> (*i*) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ,
>
> * * *
>
> (*iii*) in a domestic relations action, a post-judgment order affecting the custody of a minor . . . .

Here, there is no question that MCR 7.202(6)(a)(*i*) does not apply, as the order did not dispose of all the claims in the action because those claims were resolved in the prior judgment of divorce. Hence, the question is whether this "post-judgment order *affect[ed] the custody of a minor*" under MCR 7.202(6)(a)(*iii*) (emphasis added).

"In examining this issue, we consider the nature and scope of the order being appealed, and decide what the order is, at its essence, and what it is not." *Madson v Jaso*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 331605); slip op, p 4, app held in abeyance. This Court has held that, in order to invoke jurisdiction pursuant to MCR 7.202(6)(a)(*iii*), "an order need not expressly indicate that it is a custody determination." *Id*.; slip op at 4. Stated differently, simply because an order does not specifically state that it is a "custody" order, it does not mean that it is not an "order affecting the custody of a minor" pursuant to the court rule. See *Thurston v Escamilla*, 469 Mich 1009 (2004).

This Court has recently expressed concern regarding attempts to construe the phrase "affecting the custody of a minor" found in MCR 7.202(6)(a)(*iii*), noting that there was "ambiguity in the language of the court rule." *Madson*, ___ Mich App at ___; slip op at 5. In light of this uncertainty, this Court has previously consulted dictionary definitions to construe the aforementioned phrase. In *Wardell*, 297 Mich App at 132, this Court considered the definition of "affect" in *Black's Law Dictionary* (9th ed), noting that it was defined as "[m]ost generally, to produce an effect on; to influence in some way." In considering that definition of the term "affect," this Court held that "MCR 7.202(6)(a)(*iii*) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that 'change' the custody of a minor." *Wardell*, 297 Mich App at 132. As a result, "a 'postjudgment order affecting the custody of a minor' is an order that produces an effect on or influences in some way the legal custody *or* physical custody of a minor." *Varran*, 312 Mich App at 604; see also *Madson*, ___ Mich App at ___; slip op at 5 (stating that an order affecting physical custody "includes one where the trial court's ruling has an effect on where the child will live").[2]

[2] We are cognizant that this Court recently made a contrary statement—that the court rule's reference to "custody" should be read to only relate to *physical* custody. *Ozimek v Rodgers (On*

Because our jurisdiction pursuant to MCR 7.203(A)(1) "is limited to the portion of the order with respect to which there is an appeal of right," we need to analyze each portion of the trial court's order to determine which portions, if any, we have jurisdiction to hear an appeal of right.

A. PARENTING TIME

The first portion of the order to consider is the part that increased plaintiff's parenting time. The record reveals that the judgment of divorce originally provided plaintiff with 48 overnight visits per year. The judgment did not indicate a schedule for when those visits should or could be exercised. In December 2015, plaintiff moved the trial court to increase his parenting time. The trial court granted that motion and provided plaintiff with an additional 32 overnight visits per year, bringing plaintiff's overnight total to 80.[3] Merely seven months after being granted that additional time, plaintiff again moved the trial court for increased parenting time. The trial court granted plaintiff additional parenting time, which amounted to 125 overnight sessions per year.

We hold that the trial court's order affected the physical custody of the children. In a span of seven months, the minor children went from spending 13% of the year with plaintiff, to spending 22% of the year with plaintiff, and finally spending 34% of the year with plaintiff. Stated differently, instead of living with defendant for almost all of the year, the minor children now live with plaintiff for more than one-third of the year. Although this difference might not be enough to render the increased parenting time as a *change* in custody or established custodial environment, that is not the test. Instead, the order must merely *affect* the custody of the child. And here, the order had a substantial "effect on where the child[ren] will live." *Madson*, ___ Mich App at ___; slip op at 5. Accordingly, this Court has jurisdiction to consider as part of an appeal as of right the portion of the order increasing plaintiff's parenting time. MCR 7.203(A)(1); MCR 7.202(6)(a)(*iii*).

B. SCHOOL PLACEMENT

The second part of the order that we must consider provided that the children would attend a public school rather than private school. The record reveals that the minor children originally attended a private, Christian school near defendant's home. However, plaintiff moved the trial court to order the children to be enrolled in public school instead. After the trial court announced its decision that the children should be enrolled in a public school on a temporary basis, the parties agreed that the children would attend Meadowbrook Elementary. The parties agreed to that school because it was close to the private school the minor children were planning to attend and the school was within defendant's school district.

Remand), ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 331726); slip op, p 6, lv pending. However, *Ozimek*, like us, was bound by our prior decision in *Varran.* MCR 7.215(J)(1). Consequently, we do not believe we are bound by *Ozimek*'s determination.

[3] There was no appeal of that order, and we offer no opinion on the appropriateness of the trial court's action.

From these facts, it is plain that the change in school ordered by the trial court did not affect the physical custody of the children. The children did not have to move as a result of the change in schools and did not have to spend more or less time with any parent as a result of the change. Therefore, because physical custody was not affected, the question remains whether the court's decision affected the legal custody of the children.[4] We hold that it does not.

"Legal custody" refers to the " 'decision-making authority as to important decisions affecting the child[ren]'s welfare.' " *Varran*, 312 Mich at 604, quoting *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013). But the trial court's decision on which school the child was to attend did not affect the legal custody of the child, i.e., the decision-making *authority* of any parent. Unlike the parent in *Varran*, who had sole legal custody over the child and was not allowed to make certain decisions regarding grandparenting time, *id.* at 605-606, both parents here *retained their authority to make decisions*. It is important to note that when two parents who have joint legal custody cannot come to an agreement on an important decision, it falls to the court to "resolve the stalemate" in the best interests of the child. *Id.* at 606; see also *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). Clearly, when a court resolves such a dispute or "stalemate" between two parents who hold joint legal custody of a child, it does not interfere with or override a parent's legal right because neither parent has the authority to unilaterally make such decisions. Therefore, because the court's order related to which school the children should attend did not affect physical nor legal custody, this portion of the order is not appealable by right.

C. REFERRAL OF CHILD SUPPORT

The third part of the trial court's order—referral of the issue of child support to the friend of the court—is likewise not properly before this Court. The facts reveal that the trial court merely referred the issue of child support to the friend of the court for recalculation but did not change the amount of support. Thus, it is plain that the trial court's order with respect to child support was not an "order affecting the custody of a minor" because it did not change anything with respect to the minors, did not affect where the children would live, and did not affect the decision-making authority of any parent. Thus, that portion of the order is likewise not properly before this Court as an appeal of right pursuant to MCR 7.203(A)(1) and MCR 7.202(6)(a)(*iii*).

D. SUMMARY

We hold that the portion of the order pertaining to the increase in plaintiff's parenting time is a "final order" as it "affect[s] the custody of a minor," MCR 7.202(6)(a)(*iii*), which means that this Court has jurisdiction to hear this portion of the appeal, as of right, under MCR 7.203(A)(1). However, the other portions of the order do not affect the custody of the children, which deprives us of jurisdiction to hear those issues. While we recognize that we have the inherent authority to consider all of the issues raised in defendant's appeal "as on leave granted 'in the interest of judicial economy,' " *Rains v Rains*, 301 Mich App 313, 320 n 2; 836 NW2d

[4] We have already noted our disagreement with the binding nature of the *Ozimek* Court's pronouncement that "custody" in MCR 7.202(6)(a)(*iii*) refers only to physical custody.

709 (2013), quoting *Detroit v Michigan*, 262 Mich App 542, 545-546; 686 NW2d 514 (2004), we decline to do so because the need for immediate review is not apparent. First, the order that changed schools was merely temporary pending the outcome of an evidentiary hearing.[5] Second, the order referring the issue of child support to the friend of the court did not change anything. We therefore dismiss these two parts of the appeal for lack of jurisdiction.

II. REVIEW OF PARENTING-TIME ADJUSTMENT

A. STANDARD OF REVIEW

Like all issues involving child custody, "[o]rders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). "Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). With regard to parenting-time decisions, this Court will find an abuse of discretion only where a "trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Meanwhile, "[c]lear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law." *Shade*, 291 Mich App at 21 (quotation marks and citation omitted).

B. GOVERNING LAW

A child custody order may be modified only if the moving party first establishes proper cause or a change of circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). Included in the term "child-custody determination" is a "parenting time" determination. MCL 722.1102(c); see also *Shade*, 291 Mich App at 22. The purpose of this limitation on the modification of child custody is to minimize unwarranted and disruptive changes of custody. *Vodvarka*, 259 Mich App at 509.

"The framework for evaluating 'proper cause' or 'change of circumstances' when a party requests to modify a parenting-time order depends on whether an established custodial environment is affected and the type of modification requested." 1 Kelly, Curtis & Roane, Michigan Family Law (7th ed) (ICLE, 2011), § 12.33, p 679. An established custodial environment exists where, "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

[5] We note that any information pertaining to this January 2017 hearing is not part of the lower court record before us. In any event, any appeal would be more appropriate after this more "final" decision takes place.

If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate."[6] *Shade*, 291 Mich App at 27. However, when a trial court's modification of parenting time is not so significant that it results in a change in the minor child's custodial environment, then a more expansive definition of "proper cause" or "change of circumstances" is utilized. *Id.* at 27-28. Specifically, "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of consideration that trial courts should take into account in making determinations regarding modification of parenting time." *Id.* at 30.

Once a proper cause or change in circumstances is established, the focus of any new parenting-time order is "to foster a strong relationship between the child and the child's parents." *Id.* MCL 722.27a(1) provides that

> [p]arenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provide in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

To ensure that parenting-time orders foster a strong parent-child relationship, in addition to the best-interest factors in the Child Custody Act, MCL 722.23, our Legislature has provided in MCL 722.27a(6) the following list of non-exhaustive factors that a court should consider when entering or modifying a parenting-time order:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.

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[6] *Vodvarka* provides that "[i]n order to establish a 'change of circumstances.' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 259 Mich App at 513. The *Vodvarka* Court stressed that

> not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id.* at 513-514.]

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

While custody decisions require findings under all of the best-interest factors, parenting-time decisions can be made with findings that are related only to the contested issues. *Shade*, 291 Mich App at 31-32.

C. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant argues that the trial court wrongly decided that the parenting-time order did not change an established custodial environment. We disagree. "While an important decision affecting the welfare of the child may well require adjustments in the parenting-time schedules, this does not necessarily mean that the established custodial environment will have been modified." *Pierron*, 486 Mich at 86. "If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." *Id*.

In previous decisions by this Court considering this issue, the primary concern appears to be how much time each parent had with the children before and after the parenting-time order was entered. In *Brown v Loveman*, 260 Mich App 576, 597-598; 680 NW2d 432 (2004), this Court held that a parenting-time order that changed the time each parent spent with the minor child from six months each to nine months for one parent and three months for the other amounted to a change in an established custodial environment. Comparatively, in *Shade*, 291 Mich App at 27 n 3, the parenting-time modification in question merely rearranged the parenting-time days that were already awarded, without adding or subtracting an appreciable amount from either party. The *Shade* Court held that such a limited change in parenting time did not amount to a change of an established custodial environment. *Id*.

The parenting-time modification here falls between those two cases, with plaintiff being provided approximately 45 additional parenting-time days (56% increase—125 days as opposed to 80) in the appealed order. With this latest increase, defendant maintained 66%, or two-thirds, of the overnight visits with the children. While the increase was relatively large compared to the

original order (greater than 50% increase for plaintiff), defendant maintained a clear majority of the parenting time. Further, there is no evidence on the record to suggest that the children might begin to look to plaintiff for a larger parental role. Therefore, we cannot say that the trial court's finding that there was no change in the established custodial environment is against the great weight of evidence, and therefore, we will not disturb it.

D. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Defendant argues that, in connection with plaintiff's latest (filed in July 2016) motion to modify parenting time, the trial court failed erred when it found that there was proper cause or a change of circumstances to warrant such a change. We agree.

In his motion, plaintiff referenced how his job demotion at Ford Motor Company qualified as a proper change in circumstances *for his prior motion* to change parenting time, which was filed in December 2015.[7] But in his July 2016 motion, plaintiff failed to allege any change in circumstances that occurred *since that December 2015 order was entered*. Instead, it is clear that he and the trial court merely relied upon his less-demanding job schedule that accompanied his demotion, which occurred *before* the December 2015 order was entered. While this type of change in employment normally would constitute a change of circumstances in the context of a parenting-time modification that did not alter the established custodial environment, see *id.* at 30, this was not a "change" from the circumstances that existed when the last parenting-time order was entered. As this Court has explained:

> Because a "change of circumstances" requires a "change," the circumstances must be compared to some other set of circumstances. And since the movant is seeking to modify or amend the prior custody order, it is evidence that the circumstances must have changed since the custody order at issue was entered. Of course, evidence of the circumstances existing at the time of and before entry of the prior custody order will be relevant for comparison purposes, but the change of circumstances must have occurred *after* entry of the last custody order. As a result, the movant cannot rely on facts that existed before entry of the custody order to establish a "change" of circumstances. [*Vodvarka*, 259 Mich App at 514.]

If plaintiff was dissatisfied with the outcome from the trial court's December 2015 order and thought he should have received a higher amount of parenting time, his remedy was to appeal that order—not to file a subsequent motion a few months later based on the same change of circumstances that the trial court already considered when it ruled previously.

Consequently, we hold that the trial court's finding that there was a sufficient change of circumstances to warrant addressing plaintiff's July 2016 motion to modify parenting time is

[7] In that prior December 2015 motion, plaintiff noted how he testified in a July 2015 hearing that he took a job demotion, "which has eliminated the requirement of extensive travel" and made him more available for parenting time.

against the great weight of evidence. In fact, we note that there was no new evidence presented on this matter. Thus, the only information the court had were the parties' allegations contained in plaintiff's motion and defendant's response, plus any information from the prior proceedings. But because the change in circumstances that plaintiff alleged occurred before the entry of the prior parenting-time order, the trial court necessarily erred when it relied on this change to support the instant motion. Further, we also note that there is nothing in the record to show how plaintiff's circumstances have changed in the seven months since the December 2015 order was entered. Accordingly, because plaintiff bears the burden of proof and failed to meet his burden, the motion must fail. See *id.* at 509 (stating that the movant "has the burden of proving by a preponderance of the evidence that either proper cause or a change in circumstances exists").[8]

Therefore, because the trial court erred when it found that there was a sufficient change of circumstances to justify a modification of parenting time, we reverse the portion of the order that increased plaintiff's parenting time.

III. CONCLUSION

Because the portions of the trial court's order pertaining to (1) the referral of the child support matter to the friend of the court and (2) the placement of the children in public school pending an evidentiary hearing did not affect the custody of any child, we do not have jurisdiction to hear an appeal on these matters. Accordingly, we dismiss these portions of the appeal.

However, we do have jurisdiction to hear the appeal pertaining to the modification of parenting time. Because the trial court erred when it relied on a change of circumstances that did not occur after the entry of the last parenting-time order, the court did not have the authority to

[8] Moreover, assuming plaintiff had alleged in his motion a sufficient change of circumstances—i.e., one that occurred sometime after the last parenting-time order was entered—the court's failure to hold an evidentiary hearing on the matter was erroneous. While evidentiary hearings are not always required, they usually are needed in the event that the movant's alleged facts underlying a change in circumstances are disputed. See *Vodvarka*, 259 Mich App at 512. And, here, defendant specifically disputed the notion that defendant had any change in job responsibilities, and she claimed to have a sworn statement from plaintiff's employer that supported her position. Thus, if the alleged change in circumstances had occurred after December 2015, then an evidentiary hearing would be necessary to resolve the dispute on this key issue.

modify the parenting-time schedule. Consequently, we reverse the portion of the order that modified parenting time.[9]

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Henry William Saad

[9] Assuming plaintiff proved a valid change of circumstances, we would reverse for another reason. The trial court has an obligation to make findings related to any contested best-interest factors. *Shade*, 291 Mich App at 31-32. And, here, while opposing plaintiff's motion for increased parenting time, defendant alleged, *inter alia*, that (1) plaintiff suffered from alcohol abuse and was often inebriated while with the children and (2) plaintiff had a history of missing parenting-time sessions. These allegations pertain to parenting-time best-interest factors MCL 722.27a(7)(c) (reasonable likelihood of abuse/neglect) and (g) (failure to exercise reasonable parenting time), as well as MCL 722.27a(3) (stating that parenting time should not be granted where the time "would endanger the child's physical, mental, or emotional health"). Despite defendant's arguments, supported by documentary evidence, the trial court did not make findings of fact regarding these issues, did not reference the disputed best-interest factors, and never explicitly stated that it would be in the children's best interests to increase plaintiff's parenting time. It was inappropriate for the court to ignore these matters. If the matter should arise in the future, the court should make the requisite findings.